9-23-2015

State v. Cook Respondent's Brief Dckt. 42278

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 42278
Plaintiff-Respondent,	)	
	)	Teton Co. Case No.
vs.	)	CR-2013-728
	)	
WILLIAM LEE COOK III,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON

HONORABLE GREGORY W. MOELLER
District Judge

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO, Plaintiff-Respondent, vs. WILLIAM LEE COOK III, Defendant-Appellant.	)	No. 42278 Teton Co. Case No. CR-2013-728

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STATEMENT OF THE CASE

Nature Of The Case

William Lee Cook III appeals from his judgment of conviction for sexual abuse of a minor. On appeal he argues that the district court committed fundamental error in the impaneling of the jury and abused its discretion in an evidentiary ruling.

Statement Of The Facts And Course Of The Proceedings

At the beginning of June, 2013, E.K. stayed the day at the house of her cousin, William Cook. (Tr., vol. I, p.264, L.17 – p.265, L.11.) Sometime after dinner, when her aunt had gone to bed, Cook asked E.K. if she would like to play videogames and watch movies with him in his room. (Id., p.265, Ls.12-21.) Eventually, E.K. fell asleep in Cook's bed while watching a movie. (Id., p.267, Ls.7-21.) E.K. awoke to find her pants partway down with Cook's hand down her pants, "trying to finger" her. (Id., p.268, L.9 – p.269, L.9.) Cook rubbed and fondled E.K.'s buttocks and genitals while masturbating, ultimately ejaculating on E.K. (Id., p.270, L.16 – p.272, L.20.) Cook was 23 (Tr., vol. II, p.73, Ls.20-23) and E.K. was 14 (Tr., vol. I, p.263, Ls.2-4). During a subsequent police interrogation, Cook confirmed E.K.'s story, admitting that he touched E.K.'s buttocks and ejaculated on her. (Compare State's Ex. 6 at 12:25:40 – 12:37:48 with Tr., vol. I, p.265, L.19 – p.272, L.20.)

The state charged Cook with sexual abuse of a minor child. (R., pp.14-15.) The case proceeded to trial (see Tr., vols. I and II), following which the jury found Cook guilty of sexual abuse (R., p.178). The district court entered judgment against Cook and sentenced him to a unified term of 15 years with two years fixed. (R., pp.191-92.) Cook filed a timely notice of appeal. (R., pp.202-03.)

ISSUES

Cook states the issues on appeal as:

> 1. Did the district court violate Mr. Cook's due process and fair trial rights by allowing a statutorily unqualified person to sit as a juror?
>
> 2. Did the district court err in excluding all evidence and testimony as to the results of the DNA testing performed on the pajama bottoms?

(Appellant's brief, p.4.)

The state rephrases the issues as:

1. Has Cook failed to show fundamental error in the district court allowing Ms. Hall to serve on his jury?

2. Has Cook failed to show that the district court abused its discretion in its ruling on the state's motion *in limine*?

ARGUMENT

I.
Cook Has Failed To Show Fundamental Error In The District Court Allowing Ms. Hall To Serve On His Jury

A. Introduction

During *voir dire*, the district court asked prospective juror Alexa Hall to state her name, city of residence, employment, and, if married, her spouse's employment. (Tr., vol. I, p.72, Ls.6-8.) Ms. Hall explained that she was engaged to a serviceman in the United States Air Force currently stationed in England, was unemployed, and claimed that she had moved from Teton County to Rigby. (Id., p.72, Ls.9-21.) Questioned, Ms. Hall stated that she had lived in Rigby for a couple months and intended for it to be a permanent move. (Id., p.72, L.22 – p.73, L.2.) Though she had not yet registered to vote nor changed her driver's license, she intended to. (Id., p.73, Ls.3-11.) She also acknowledged that she was not working in Rigby, and neither rented nor owned property in Jefferson County, instead living with a roommate. (Id., p.73, Ls.12-18.)

The court again asked Ms. Hall if she had any intention of returning to Teton County, and she said that she did not but that she could stay at her brother's place when she was there. (Id., p.73, L.19 – p.74, L.7.) The court directly asked Ms. Hall if she considered herself a resident of Teton County and she responded that she grew up there. (Id., p.74, Ls.8-10.) The court then explained that even though Ms. Hall "may be temporarily living in another county doesn't mean you're not still a resident legally in Teton County." (Id., p.74, Ls.11-14.) Ms. Hall agreed that she was still legally a resident of Teton County because that is where her car was registered and where she had her driver's license issued. (Id., p.74, Ls.15-17.) Though she may have intended to

change those things in the future, she had not changed it yet, she had not established any kind of ownership in Jefferson County, and she considered herself still a legal resident of Teton County. (Id., p.74, L.18 – p.75, L.11.)

The district court then asked: "Do any of the attorneys want to question her competency to serve on a Teton County jury?" (Id., p.75, Ls.12-14.) Defense counsel responded, "Not from the defense's standpoint, your Honor." (Id., p.75, Ls.15-16.) The prosecutor concurred. (Id., p.75, L.17.)

Now, for the first time on appeal, Cook claims that the district court committed fundamental error by allowing Ms. Hall to sit on the jury. (Appellant's brief, pp.5-15.) Cook's claim fails. First, any potential constitutional right Cook may have had to have Ms. Hall disqualified from serving on the jury panel was waived. Second, it is not clear from the record above that Ms. Hall was not qualified to serve on Cook's jury panel. Finally, Cook has failed to attempt to show, much less actually show, that he was prejudiced by Ms. Hall serving on the jury panel. Cook has failed to show fundamental error entitling him to review of this unpreserved issue.

B. Standard Of Review

Absent a timely objection, the appellate courts of this state will only review an alleged error under the fundamental error doctrine. State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010).

C. Cook Has Failed To Meet Any Of The Three Prongs Under *Perry* To Establish Fundamental Error

For the first time on appeal, Cook asserts that allowing Ms. Hall to serve on his jury panel was unconstitutional because, he alleges, she was not a resident of Teton

County. (Appellant's brief, pp.5-15.) Because Cook did not object to Ms. Hall's jury service below, he is required to show fundamental error on appeal. Perry, 150 Idaho at 226, 245 P.3d at 978. To establish fundamental error,

> the defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless.

Id. at 228, 245 P.3d at 980. Cook has failed to meet this burden.

1. Cook Waived Any Potential Constitutional Right Regarding Ms. Hall's Residence

Citing the Idaho Supreme Court's opinion in State v. Nadlman, 63 Idaho 153, 118 P.2d 58 (1941), Cook contends that he had a constitutional right to have a jury composed of Teton County residents. (Appellant's brief, pp.5-14.) Even assuming that Cook had a constitutional right that Ms. Hall be a resident of Teton County, he waived that constitutional right when, invited by the district court to express any concerns or questions regarding Ms. Hall's competence to serve on the jury panel, the defense instead passed her for cause.

A defendant may waive a constitutional right, so long as it is done knowingly, voluntarily, and intelligently. Perry, 150 Idaho at 227, 245 P.3d at 979. Any potential concerns regarding Ms. Hall's residency were presented and examined during *voir dire*. Therefore, when Cook passed Ms. Hall for cause he did so knowingly and intelligently, and there is no argument that it was not done voluntarily. This stands in stark contrast to the facts of Nadlman, where the juror summonsed for Nadlman's Bingham County

trial represented that he was a resident of Bingham County and the defendant did not know that the juror was not in fact a resident of Bingham County. Nadlman, 63 Idaho 153, 118 P. 2d at 61.

The first prong of Perry requires the defendant to show that the alleged error violates an unwaived constitutional right. Perry, 150 Idaho at 228, 245 P.3d at 980. Cook has failed to meet this first prong because, even assuming Cook had a constitutional right to have Ms. Hall be a resident of Teton County, Cook waived that right when he passed Ms. Hall for cause.

2. Whether Ms. Hall Was In Fact A Resident Of Jefferson County Or Was A Resident Of Teton County Is Not Clear On The Record

To be statutorily qualified to serve as a juror, an individual must be a citizen of the United States, eighteen years old, and a resident of the county. I.C. § 2-209(2)(a). Cook claims that Ms. Hall was not qualified to sit on his jury because, he alleges, she was a resident of Jefferson County. (Appellant's brief, p.14.) But Ms. Hall's residency is not clear on the record. While she claimed to have moved to Rigby a couple months prior, she had taken no steps to establish residency in Jefferson County: She neither rented nor owned a residence, she was not registered to vote there, and her driver's license and vehicle registration were still in Teton County. (Tr., vol. I, p.72, L.18 – p.73, L.11; p.74, Ls.15-21; p.74, L.25 – p.75, L.11.) Similar to her living arrangements in Jefferson County where she stayed at a friend's place, she was able to stay at her brother's when she was in Teton County. (Id., p.73, Ls.19-25.) And most importantly, she still considered herself a legal resident of Teton County. (Id., p.74, Ls.22-24.)

That Ms. Hall was no longer a resident of Teton County is also not clear under the law. As noted by Cook, the Uniform Jury Selection and Service Act does not define the term "resident." (Appellant's brief, pp.7-9.) The act does, however, require the jury commission to

> compile and maintain a master jury list consisting of the current voter registration list for the county *supplemented with names from other lists of persons resident therein*, such as lists of utility customers, property taxpayers, motor vehicle registrations, driver's licenses, and state identification cards, which the supreme court from time to time designates.

I.C. § 2-206(1) (emphasis added). This suggests that "resident," as contemplated by the Uniform Jury Selection and Service Act, includes those who pay utility fees and property taxes, and who have vehicle registrations and driver's licenses within the county. As she explained to the court, Ms. Hall has none of those things in Jefferson County, whereas her driver's license and vehicle registration were both issued in Teton County. (Tr., vol. I, p.74, L.15 – p.75, L.11.)

Cook argues that the Court should define "resident" as someone who actually lives in the county. (Appellant's brief, p.9.) But as Ms. Hall explained, she has places to stay in both Jefferson and Teton County: Whether with her friend in Jefferson County or with her brother in Teton County. (Tr., vol. I, p.73, L.15 – p.74, L.7.) Ms. Hall neither rents nor owns either residence. As the district court correctly explained, "temporarily living in another county doesn't mean you're not still a resident legally in Teton County." (Id., p.74, Ls.11-14.) This is especially true of someone who appears, as in Ms. Hall's case, to be temporarily transient.

Under the second prong of Perry, a defendant must show that the error "plainly exists" in the appellate record. Perry, 150 Idaho at 228, 245 P.3d at 980. Based on Ms.

Hall's testimony regarding her many connections to Teton County while under examination by the district court during *voir dire*, the error that Cook alleges—that Ms. Hall was in fact a resident of Jefferson County and thus unqualified to serve on a jury in Teton County—is not clear on the record. Having failed to meet the second prong of Perry, Cook has failed to show fundamental error.

3. Because Cook Was Not Deprived Of Counsel And Was Tried By An Impartial Adjudicator, Ms. Hall's Potential Residence Does Not Amount to Structural Error

Cook argues that including Ms. Hall on the jury panel amounts to structural error and therefore he need not show that the alleged error of including Ms. Hall affected the outcome of his trial. (Appellant's brief, pp. 13-14.) Cook's argument fails.

In support of his argument that allowing Ms. Hall to serve on the jury panel when she was, allegedly, not a resident of Teton County, Cook cites Arizona v. Fulminante, 499 U.S. 279 (1991), and State v. Paz, 118 Idaho 542, 551, 798 P.2d 1, 10 (1990) (overruled on other grounds by State v. Card, 121 Idaho 425 (1991)). Neither case stands for the proposition that impaneling a nonresident juror amounts to "structural error." In Paz, the Idaho Supreme Court addressed claims that Hispanics were systemically excluded from the jury, and held that Hispanics were not improperly excluded. Paz, 118 Idaho at 551-552, 798 P.2d at 10-11. In Fulminante, the United States Supreme Court listed trial errors which may be structural; this list of errors does not include the impaneling of a juror who does not reside in the county in which the trial is held. Fulminante, 499 U.S. at 307-08.

As a general rule, constitutional violations are subject to the harmless error analysis. Perry, 150 Idaho at 222-223, 245 P. 2d 974-975. However, the United States

Supreme Court has recognized that structural errors which affect "the framework within which the trial proceeds, rather than simply an error in the trial process itself" may not be subject to harmless error analysis. Arizona v. Fulminante, 499 U.S. 279, 307-08 (1991). The Idaho Supreme Court has recognized that the following errors constitute structural defects:

> (1) complete denial of counsel; (2) biased trial judge; (3) racial discrimination in the selection of a grand jury; (4) denial of self-representation at trial; (5) denial of a public trial; (6) defective reasonable-doubt instruction; and (7) erroneous deprivation of the right to counsel of choice.

Perry, 150 Idaho at 222–23, 245 P.3d at 974–75 (internal citations omitted). However, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." Id. (citing Rose v. Clark, 478 U.S. 570, 579 (1986).) Cook had counsel, and nothing in the record suggests that Ms. Hall was unable to be an impartial adjudicator.

Following the examination of Ms. Hall's residency status highlighted above, the court continued by asking if she knew anything about the case. (Tr., vol. I, p.75, Ls.18-20.) She did not (id., p.75, L.21); nor was she concerned about her ability to be fair and impartial in consideration of the subject matter of the case (id., p.75, Ls.22-25). Though she had seen Cook during high school, she had not dated him or associated with him. (Id., p.76, Ls.1-21.) And Ms. Hall did not know the victim. (Id., p.76, Ls.22-23.) Nothing in the record suggests that Ms. Hall was unable to be a fair and impartial juror. Cook's alleged error, therefore, would not be structural.

Because the error Cook alleges is not structural, he is required to show prejudice under the third prong of Perry. Perry, 150 Idaho at 228, 245 P.3d at 980. Cook has not even attempted to show prejudice, nor can he because, as explained above, the record shows that Ms. Hall was an impartial juror. Having failed to show prejudice, Cook has failed to establish fundamental error.

Cook has failed to meet any of the prongs articulated by the Court in Perry. He has failed to show fundamental error entitling him to review of this unpreserved issue. The judgment of the district court should be affirmed.

II.
Cook Has Failed To Show That The District Court Abused Its Discretion In Its Ruling On The State's Motion *In Limine*

A. Introduction

On the eve of trial, hoping to avoid objections during trial, the state filed a motion *in limine* seeking to exclude three exhibits anticipated from the defense, including an Idaho State Police Forensic DNA Report from January 30, 2014. (R., pp.46-54; see also Tr., vol. I, p.154, L.11 – p.156, L.16.) After hearing argument from both parties, the district court decided to exclude the report because the defense had not subpoenaed any witness who would be able to lay sufficient foundation for admitting the report. (Id., p.184, L.4 – p.186, L.9.) Additionally, the report itself, which apparently showed that no one's DNA—including the victim's—was found on the pajama pants, would have little relevance in the trial. (Id., p.160, L.11 – p.161, L.8.) The parties, however, would still be able to elicit testimony that during the interrogation of Cook, officers had "bluffed" when they claimed that Cook's DNA was on E.K.'s pajama pants. (Id., p.245, L.9 – p.256, L.3.)

On appeal Cook argues that the district court abused its discretion in its ruling on the state's motion *in limine*. (Appellant's brief, pp.16-21.) Cook, however, has not challenged the actual basis of the district court's ruling and so has failed to establish any error. Moreover, although Cook appears to argue that the district court should have reconsidered its ruling on the motion *in limine* because the state "opened the door" to the introduction of the DNA report, Cook never asked the court to reconsider its ruling and, therefore, failed to preserve this claim of error for appellate review.

B. Standard Of Review

Evidentiary rulings by the trial court are generally reviewed for an abuse of discretion. State v. Porter, 130 Idaho 772, 785, 948 P.2d 127, 140 (1997); State v. Lewis, 126 Idaho 77, 82, 878 P.2d 776, 781 (1994).

C. Cook Has Failed To Challenge The Basis For The District Court's Ruling

"[T]he admissibility of scientific evidence is governed by the Idaho Rules of Evidence and the opinions of the Court." State v. Faught, 127 Idaho 873, 876, 908 P.2d 566, 569 (1995). Lab reports, by themselves, are generally excluded as hearsay. See State v. Sandoval-Tena, 138 Idaho 908, 911-12, 71 P.3d 1055, 1058-59 (2003). In order to admit the lab report, Cook was required to lay foundation for the report through a witness with personal knowledge. I.R.E. 602. Because of the scientific nature of the report, that witness needed to be an expert. I.R.E. 702. Because neither party had subpoenaed the lab technician who performed the DNA testing (or any expert) there was no one to provide the necessary foundation to admit the exhibit. The district court, therefore, correctly excluded the exhibit.

On appeal Cook does not address the district court's basis for excluding the DNA report—that there was no witness to lay foundation for the report. (See Appellant's brief, pp.16-21.) Because he has failed to address this basis for the district court's ruling, the court's ruling must be affirmed on that unchallenged basis. See State v. Goodwin, 131 Idaho 364, 366, 956 P.2d 1311, 1313 (Ct. App. 1998) (where a basis for a trial court's ruling is not challenged on appeal, an appellate court will affirm on the unchallenged basis).

During trial, Cook was able to elicit testimony that the interrogating officer had "flat out lied" in regards to DNA evidence inculpating Cook. (Tr., vol. II, p.24, Ls.12-18; p.28, Ls.5-15.) The interrogating officer in fact had no DNA evidence. (Id., p.18, Ls.2-13.) Contrary to Cook's assertions on appeal, the district court's ruling did not keep this relevant information from the jury. The district court's ruling only kept out an exhibit for which the necessary foundation could not be laid.

D. Cook Did Not Preserve His Challenge To The District Court's Ruling For Appellate Review

Instead of challenging the district court's basis for granting the state's motion *in limine*, Cook appears to argue that in light of objectionable trial testimony offered by the officer, the door was "opened" and so the district court should have reconsidered its ruling on the motion *in limine*. (Appellant's brief, pp.16-21.) But this issue is not preserved for appellate review.

After the district court granted the state's motion *in limine*, during its examination of Officer Hale, the prosecutor asked "what other steps in the investigation" the officer had taken after initially meeting with Cook. (Tr., vol. I, p.240, Ls.11-13.) Unsolicited,

and despite the prosecutor's specific admonition not to discuss DNA in any way (id., p.241, L.20 – p.242, L.7), the officer volunteered that he took DNA samples from everyone (id., p.240, Ls.14-16). Following an objection, the prosecutor requested a sidebar. (Id., p.240, L.21 – p.241, L.3.)

After dismissing the jury, the district court discussed the error with the parties. (Id., p.241, L.6 – p.249, L.23.) The district court thought it could address the issue with a curative instruction. (Id., p.242, Ls.15-20.) The prosecutor agreed that a curative instruction would be appropriate. (Id., p.242, L.15 – p.243, L.10.) Defense counsel also approved of the district court's intention to offer a curative instruction, as long as the error did not repeat itself. (Id., p.243, L.15 – p.244, L.7.)

Having received the parties' express consent, the district court invited the jury to return to the courtroom and offered the following curative instruction:

> Ladies and gentlemen of the jury, there is a matter that I need to discuss with you briefly.
>
> There was some reference in the earlier testimony concerning evidence, DNA type genetic evidence and whether or not there may have been any testing on that or not. And there was an objection which I sustained. A lot of what happens in trials happens before you ever come here or happens when you're not in the Court's presence, and I make the rulings.
>
> I made a ruling earlier in this case about what evidence is admissible and what evidence is not. And there's certain evidence that I ruled was not admissible. Any reference to any genetic tests in this case are not for your consideration and you're to disregard anything that may have been suggested by the question of the prosecutor about testing.
>
> I know it's sometimes hard to pretend you didn't hear something that you just heard, but that's how our system works. And so I'd ask you all to please disregard anything that was suggested by Mr. Lundberg's

question or even the earlier comments about the swabs, because I previously made rulings.

The evidence that you need to consider in making your decision is going to be the evidence that I allow to come into the court. Okay? And so please disregard anything that was said at just the very end of the witness' testimony concerning any kind of testing that may or may not have taken place. Okay?

Counsel, you may continue.

(Id., p.250, L.8 – p.251, L.14.)

"Even where a pretrial motion preserves an evidentiary objection for appeal, the defense may waive the objection during trial." State v. Gray, 129 Idaho 784, 794, 932 P.2d 907, 917 (Ct. App. 1997) (citation omitted). Generalized argument made in response to a pretrial motion *in limine* does not preserve for appellate review specific objections to evidence ultimately admitted. State v. Parmer, 147 Idaho 210, 220-21, 207 P.3d 186, 196-97 (Ct. App. 2009). Rather, "[f]or an objection to be preserved for appellate review, the specific ground for the objection must be clearly stated." State v. Norton, 134 Idaho 875, 880, 11 P.3d 494, 499 (Ct. App. 2000) (citing I.R.E. 103(a)(1); State v. Gleason, 130 Idaho 586, 592, 944 P.2d 721, 727 (Ct. App. 1997)).

Far from raising the issue of reconsideration in lieu of a curative instruction during trial, Cook in fact foreclosed it. Defense counsel expressed that the defense was "fine with [the curative instruction] because reality says even if we now can talk about these swabs, just based on what's there, we still have this chain of custody issue that we've all known about from the beginning." (Tr., vol. I, p.243, L.15 – p.244, L.2.) Cook approved of the curative instruction option below; he did not request a reconsideration of the ruling on the state's motion *in limine*. Cook cannot now claim that the district

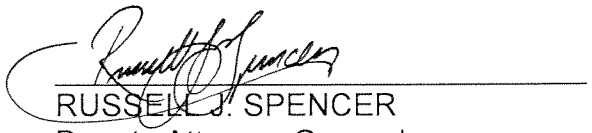
court committed error by giving the approved of curative instruction rather than reopening its earlier decision on the motion *in limine*. Cook failed to preserve for appellate review any challenge to the district court's ruling in light of the officer's objectionable testimony.

Insofar as Cook challenges the district court's order on the state's motion *in limine* on its own merits, his challenges fails because the district court's decision was manifestly correct: Because there was no expert to explain the DNA analysis and report, that exhibit could not be placed before the jury. Because Cook has not addressed this basis for the district court's ruling, the district court must be affirmed on this unchallenged basis. Insofar as Cook challenges the district court's ruling in light of the officer's objectionable testimony, he has failed to preserve this issue and it should not be considered on appeal.

CONCLUSION

The state respectfully requests that this Court affirm Cook's conviction for sexual abuse of a minor.

DATED this 23rd day of September, 2015.



RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 23rd day of September, 2015, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SALLY J. COOLEY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in the State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

RUSSELL J. SPENCER
Deputy Attorney General

RJS/dd